No. 1069

IN THE

Supreme Court of the United States

October Term, 1944.

E. I. duPONT deNEMOURS & COMPANY, - Petitioner,

versus

MINNIE L. WRIGHT, Administratrix of the Estate of WILLIAM T. WRIGHT, Deceased, - - - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CHARLES W. MILNER,
Kentucky Home Life Building,
Louisville, Ky.,
ROBERT T. McCRACKEN,
1500 Morris Building,
Philadelphia, Pa.
ABEL KLAW,
7058 DuPont Building,
Wilmington, Del.,
Attorneys for Petitioner.

BULLITT & MIDDLETON,
Louisville, Ky.,
Of Counsel.

March 19, 1945.

WESTERFIELD-SONTE CO., INCORPORATED, LOUISVILLE, KY.

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E. I. DUPONT DENEMOURS & COMPANY, - *Petitioner,*

v.

MINNIE L. WRIGHT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM T. WRIGHT, DECEASED, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, E. I. duPont deNemours & Company, hereby petitions this Honorable Court for a writ of certiorari to be issued to review the judgment entered in the United States Circuit Court of Appeals for the Sixth Circuit on December 7, 1944 (petition for rehearing denied January 22, 1945 (R. 231); second petition for rehearing denied February 6, 1945 (R. 259)), in the above entitled cause.

OPINIONS BELOW.

The original opinion of the Circuit Court of Appeals, dated December 7, 1944, and not yet reported is printed at R. 223.[1] In response to a petition for rehearing (R. 205) which called the Court's attention to the fact that the Court had misunderstood the essential facts on which the Court had based its opinion, the Court rendered a second opinion in which it withdrew the facts on which it had based its first opinion, but nevertheless, overruled the petition for rehearing (R. 231). On account of this unique situation, a second petition for rehearing was filed (R. 233) on January 24, 1945, and overruled without opinion on February 6, 1945 (R. 259). The second opinion of the Circuit Court of Appeals is not yet reported and is printed at R. 256.[1]

The District Court rendered an opinion when it denied petitioner's motion for a directed verdict. This opinion is printed at R. 16.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (43 Stat. 938, Sec. 1, 28 U. S. C. A., Sec. 347). The judgment of the Circuit Court of Appeals was entered on December 7, 1944 (R. 203). The first petition for rehearing was denied January 22, 1945 (R. 231). The second petition for rehearing was denied February 6, 1945 (R. 259), and this petition is filed within three months thereafter.

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[1]For ready reference a copy of both the first and second opinions of the court below are printed herewith as an appendix, page 31.

SUMMARY STATEMENT OF FACTS.

This is a suit by Minnie L. Wright, Administratrix of the Estate of her husband, William T. Wright, to recover damages on account of petitioner's alleged negligence which she claims was responsible for the death of her husband on June 5, 1942. She was awarded a verdict for $15,000.

Mr. Wright was in no way responsible for the accident which resulted in his death. He was employed by Jones-Dabney Company lacquer manufacturers, in Louisville, Kentucky, for more than 15 years. His death was the result of burns which he sustained while standing in an elevator in the basement of Jones-Dabney Company when a drum of nitro-cellulose, which had been manufactured and shipped by petitioner ignited. The drum ignited when Jones-Dabney Company negligently slid or skidded it down the rough concrete surface of a ramp with a drop of 3½ feet in 14½ feet. No other consignee or handler of nitro-cellulose, except Jones-Dabney Company, ever slid or skidded a drum or container of nitro-cellulose down a concrete ramp.

Nitro-cellulose is not, strictly speaking, an explosive, although it is highly inflammable. Under the law (18 U. S. C. A. 383) nitro-cellulose can be shipped only in containers that have been approved by the Bureau of Explosives which is under the jurisdiction of the Interstate Commerce Commission. Prior to 1930, the Bureau had approved a container known as I. C. C. 20-A which was a 14-gauge galvanized drum. These containers cost approximately $15.00 each and could be

used "hundreds of times—thousands of times" (R. 122). In 1930 the Bureau approved a container known as I. C. C. 17-E (R. 149) which was a lighter 18-gauge black-painted steel drum which could only be used one time. These drums cost approximately $4.00 each. Obviously it was more economical for a manufacturer to use the heavier container, which could be re-used thousands of times instead of the lighter container which could be used only once.

Nitro-cellulose is necessary in the manufacture of lacquer. Prior to 1939 Jones-Dabney Company had purchased nitro-cellulose from petitioner. Such shipments had been made in the heavier, returnable container or drum. During 1939, 1940, 1941 and for approximately six months of 1942, Jones-Dabney Company had purchased nitro-cellulose from one of the other two manufacturers of nitro-cellulose. Petitioner had used the lighter, non-returnable container—17-E—in domestic trade at times since at least 1937 (R. 123). There is no evidence that petitioner knew or had any reason to know what types of container had been received by Jones-Dabney Company during the three and a half years that it bought nitro-cellulose from others. At the trial in January, 1944, it developed that the other two manufacturers of nitro-cellulose, for reasons of economy, had used the heavier, returnable drums in domestic trade and the lighter, non-returnable drums or containers in shipments abroad and under lend-lease (R. 143, 145).

Although the law requires that all accidents and leakages and evidence of improper handling or im-

proper containers be reported to the Bureau of Explosives which is under the jurisdiction of the Interstate Commerce Commission, there had never been a claim since 1930 that any accident was caused by a failure of the lighter container (R. 147, 149, 151).

In the spring of 1942, Jones-Dabney Company, evidently being short of material, ordered by wire a car of nitro-cellulose from petitioner (R. 63). This shipment was made in the lighter container or drum, I. C. C. 17-E. The car containing the shipment was marked with four red and white placards, one on each end and one on each of the side doors of the car, with words in large red letters, "Dangerous," "Highly Inflammable," "Keep Lights and Fire Away." The placards also contained in large letters the injunction, "Handle Carefully." On each drum was pasted a sign reading "Nitro-Cellulose," "Caution, Do Not Use Near an Open Flame or Fire" (R. 51, 52, 224, 225).

From this point the court below stated the essential facts as follows (R. 223, 224):

> "* * * The shipment containing the destroyed drum, arrived at the Jones-Dabney plant by rail, in a sealed car. Upon arrival the drums were shunted to the ground upon a wooden slide with steel rails. The drum which failed was then pushed across a concrete pavement and *skidded down a concrete chute with a drop of 3½ feet in a length of 14½ feet.*"[2]

The court below then stated the cause of the accident as follows (R. 223, 224):

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[2]Italics ours throughout.

> "There is no dispute as to the physical causes of the accident. The experts agreed that the sliding of the steel drum *upon the rough concrete surface of the ramp,* caused a spark which ignited vapor released by a *loosening of the head of the drum on the way down the ramp.* * * *"

In other words, the court correctly found that the accident was caused by skidding or sliding a steel drum head first (R. 45) down the rough concrete surface of a ramp or chute with a drop of 3½ feet in a length of 14½ feet, and that this rough treatment was sufficient to

(1) loosen the head of the drum,
(2) permit vapors to be released, and
(3) generate a spark.

Under these facts the court below imposed liability on petitioner because:

> (a) The court was of the *erroneous* opinion that the drum in question was subjected by consignee, Jones-Dabney Company "to the customary handling of drums of nitro-cellulose by lacquer manufacturers in the Louisville district," and
>
> (b) that petitioner was negligent in failing to warn the consignee of the danger in so handling the lighter drum.

The following from the first opinion of the court below demonstrate that that court thought that skidding or sliding a container of nitro-cellulose down a

concrete ramp was customary and usual in the Louisville district:

(R. 226)

"* * * There was also evidence that it was safe to skid the galvanized drum on concrete and that such skidding was practical and necessary, and conformed to the *usual practice of all Louisville lacquer manufacturers.* The evidence justified an inference that the appellant knew, or should have known, that its consignee followed the *common practice of skidding the drums* at its plant, * * *.

"The usual test for determining casual (causal)[3] relation between some failure of duty and an injurious result which follows, is the foreseeability of injury by the alleged negligent actor. * * *"

"This test is satisfied, in the present case, by evidence of the *customary* handling of drums of nitro-cellulose by the Jones-Dabney Company and other *Louisville lacquer manufacturers,* * * *

"While there is proof that much nitro-cellulose had been shipped abroad in similar containers, there is no proof that shipment in such containers had been made to consignees accustomed to handling drums *in the manner prevalent among lacquer manufacturers in the Louisville district.*"

(R. 227)

"Our conclusion is that the danger inherent in subjecting the appellant's black containers to the *customary handling of drums of nitro-cellulose by lacquer manufacturers* in the Louisville district, * * *."

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[3]Parenthesis supplied.

> "The essential claim of negligence is based upon failure to warn the consignee of the danger in rough handling of the container after they were unloaded."

Obviously therefore, the court below imposed liability on petitioner because the court thought skidding or sliding a drum of nitro-cellulose down a concrete ramp and which the court had stated was the cause of the accident, was the usual, customary method of handling drums of nitro-cellulose in this district. If the court below had been correct in its assumption of facts, its conclusion would have been proper.

However, there was no evidence in the Record that any lacquer manufacturer or anyone else in the Louisville district or anywhere else, except the consignee, Jones-Dabney Company, ever skidded or slid a nitro-cellulose drum of any kind—either the old heavy galvanized iron or the lighter steel—down a concrete chute or ramp.

The court below was of the further erroneous opinion that the lighter drum in question had been approved by the Bureau of Explosives of the Interstate Commerce Commission only for use abroad under lend-lease. The original opinion stated (R. 224):

> "It (petitioner)[4] shipped the material in a standard form of container, generally used by manufacturers of nitro-cellulose for shipment to Europe under the lend-lease agreement, and *approved for that purpose* by the Bureau of Explosives of the Interstate Commerce Commission."

[4]Parenthesis supplied.

Of course, if the Interstate Commerce Commission had approved the lighter container for use abroad *only*, and petitioner had used it in domestic shipments in this country, petitioner would have been guilty of a violation of law and liability in this case could have been imposed on it for such a breach.

However, as was shown (R. 153) the Bureau of Explosives had approved the lighter container or drum for general use anywhere in this country or abroad.

From the above it is apparent that the court below held that petitioner should have foreseen that consignee, Jones-Dabney Company, would skid or slide the lighter drum or container down the rough surface of a concrete ramp and should have warned consignee against such use, because the court thought (a) that skidding or sliding a drum of nitro-cellulose down a rough concrete ramp was customary, and (b) that the lighter drum was approved *only* for use in shipments abroad.

A petition for rehearing was filed on December 27, 1944 (R. 205), which called the attention of the court below to the fact that

> (a) there was no evidence to support the court's conclusion that it was "the customary" or "usual practice" to slide or skid heavy or light drums of nitro-cellulose down a concrete ramp, and
>
> (b) no other person except consignee, Jones-Dabney Company, had ever slid or skidded a drum of nitro-cellulose down a concrete ramp, and

(c) that the lighter drum in question had been approved by the Interstate Commerce Commission for domestic as well as foreign use.

In response to this petition for rehearing, the court below delivered a second opinion (R. 256) in which the court *withdrew the erroneous statements* of facts on which it had imposed liability in the original opinion. The second opinion is, we believe, without parallel, and for ready reference is in part as follows (R. 256):

"PER CURIAM. Upon consideration of the petition for rehearing filed by the appellant in the above-entitled cause, and upon further review of the record, the court concludes that its observations in the opinion that there was a general practice among lacquer manufacturers in the Louisville district, to skid drums of nitro-cellulose over rough concrete, is not sufficiently supported by the evidence, and such observations are withdrawn. It is further the view of the court that any implication in the opinion that there was a general practice to skid such drums down a concrete ramp, is not to be derived from the language of the opinion, and if so, any intention to raise such implication is denied. The court also is of the view that the statement in the opinion that the lighter form of container was limited to use by manufacturers of nitro-cellulose for shipment to Europe under the lend-lease agreement, and approved but for that purpose by the Bureau of Explosives of the Interstate Commerce Commission, implies a limitation on their use not warranted by the evidence, and that the reference to the use of such containers should have been broad enough to validate their use for transportation in domestic commerce."

After thus (a) withdrawing from the original opinion the references, statements and implications that it was customary to skid drums of nitro-cellulose down a concrete ramp, and (b) enlarging the opinion so as to show that the Interstate Commerce Commission had approved the lighter drum or container for domestic use, the court below nevertheless adhered to its affirmance of the judgment of the District Court (R. 257).

This situation was called to the attention of the court below in a second petition for rehearing filed January 24, 1945 (R. 233), and denied without opinion February 6, 1945 (R. 259).

Since it was shown that no other consignee except Jones-Dabney Company ever slid or skidded either a heavy or light drum of nitro-cellulose down the rough concrete surface of a ramp, and since there is no evidence that petitioner knew or should have known that the Jones-Dabney Company was treating containers of nitro-cellulose in this unheard-of manner, it is submitted that the court below imposed on petitioner the responsibility of foreseeing a misuse such as no one ever heard of.

There is this further fact: Consignee, Jones-Dabney Company admitted that as soon as it saw the lighter drum in question, it knew that such drum was different from those to which it had been accustomed; knew that the new drum looked, felt and handled different, and that the consignee was "a little bit more cautious because of the new drums." Mr. Murphy, foreman of

Jones-Dabney lacquer department, and the man in charge of unloading the shipment in question, testified:

(R. 62)

"Q. Mr. Murphy, you say when this shipment of nitro-cellulose came in you immediately noticed it was in an entirely different type of drum to those which you had been accustomed to handling?

A. That's right.

Q. It looks different, doesn't it?

A. That's right.

Q. It feels different?

A. That's right.

Q. It handles different?

A. That's right.

Q. And I believe you were a little bit cautious because of the new drums, is that right?

A. That's right."

(R. 63)

"Q. One other question, Mr. Murphy. You have been in this business, I believe you said nineteen years?

A. In the paint and lacquer business, that's right.

Q. You are familiar with drums of both types?

A. Yes, sir.

Q. And you know that this is a lighter drum, the black drum is a lighter drum than the galvanized drum.

A. That's right.

Q. And you knew that immediately upon opening these cars when you saw these drums.

A. That's right."

Thus consignee knew in advance of the accident, every fact which a notice from petitioner could have given it. It knew that this shipment was in drums that (a) were lighter, (b) looked different, (c) felt different, (d) handled different from the heavier drums that it had previously used.

Even with present hindsight, what notice could petitioner have given the consignee that consignee did not know without notice? After realizing that this shipment was in lighter, etc., drums, the conduct of the consignee Jones-Dabney Company in negligently treating it as it had treated the heavier drums, is best explained by the following testimony of consignee that it was out of nitro-cellulose and was in a hurry to get this shipment unloaded:

(R. 62)

"Q. And I believe you were a little bit cautious because of the new drums, is that right?

A. That's right.

Q. And yet Jones-Dabney permitted the different drums to be handled in just exactly the same way they had handled the others, on iron skids and on concrete ramps. Is that right?

A. The way I can answer that is, I have got orders to unload the car and go ahead and use the material.

Mr. Willis: I believe that's all.

Redirect Examination by Mr. Conner.

Q. Why did you unload this particular drum after noticing it was a different character of drum?

A. We had to have the material. We were out of material at the time, and we bought I think, a carload from DuPont, I think through a wire from the buyer, and we had to have the cotton for the orders there standing."

Neither petitioner nor the railroad company could ship nitro-cellulose except in containers that had been approved by the Bureau of Explosives, which is under the jurisdiction of the Interstate Commerce Commission. The District Court declined to admit the Regulations or testimony regarding the Regulations of the Bureau of Explosives approving the lighter container, I. C. C. 17-E, before the jury (R. 152). The court below, while agreeing that such evidence might "have diluted the fault of the appellant (petitioner) in the minds of the jury," held that if this was error, it was not prejudicial (R. 28). This was clearly wrong. If petitioner had shipped nitro-cellulose in a container that had not been approved by the Bureau of Explosives, would not the plaintiff have been entitled to show that fact in a suit for damages? Conversely, petitioner should have been permitted to prove to the jury that the container in question had been approved for domestic use and the further fact that there had never been a claim that an accident was caused by the failure of the lighter container.

QUESTIONS PRESENTED.

1. Is a manufacturer of nitro-cellulose—a highly inflammable material—negligent in failing to foresee that an experienced consignee will misuse a container of nitro-cellulose in a way that no other person ever treated a container of nitro-cellulose?

   The decision of the court below on this question is in conflict with the decision of this Court in *Brady* v. *Southern Railway Company,* 320 U. S. 476.

   The decision of the court below is also in conflict with applicable decisions of the Kentucky Court of Appeals.

2. Is a manufacturer of nitro-cellulose negligent in failing to warn an experienced consignee of nitro-cellulose not to slide or skid a drum of nitro-cellulose down "the rough concrete surface of a ramp" "with a drop of 3½ feet in a length of 14½ feet" when no other handler of nitro-cellulose ever skidded or slid a drum of nitro-cellulose down a concrete ramp?

3. Is a manufacturer negligent in failing to notify a consignee of facts which the consignee admits it knew without such notice?

4. Is it negligence to ship nitro-cellulose in a container that had been approved by the Interstate Commerce Commission more than 10 years previously and where there had never been an accident attributable to the use of such container?

5. Where a party is sued for negligence in shipping nitro-cellulose in a certain container, is such party not entitled to introduce in evidence Regulations of the Interstate Commerce Commission approving the use of such container—such Regulations being issued pursuant to 18 U. S. C. A. 383?

   The decision of the court below on this question is in conflict with decisions of the Second and Third Circuit Courts of Appeal.

6. Is a manufacturer liable for shipping nitro-cellulose in a container approved by the Interstate Commerce Commission where there is no evidence that there was anything wrong with the nitro-cellulose or anything wrong with the container in which it was packed and where the accident was caused by the consignee sliding or skidding the container down the rough concrete surface of a ramp—a misuse of the container to which no other consignee ever subjected a container of nitro-cellulose?

REASONS FOR GRANTING THE WRIT.

1. In its first opinion the court below held the drum in question was "skidded down a concrete chute with a drop of 3½ feet in a length of 14½ feet" and that the cause of the accident was "the sliding of the steel drum upon the rough concrete surface of the ramp, caused a spark which ignited vapor released by a loosening of the head of the drum on the way down the ramp."

In its first opinion the court held the test of foreseeability "is satisfied in the present case by evidence

of the *customary* handling of drums of nitro-cellulose by the Jones-Dabney Company and *other Louisville* lacquer manufacturers," also "Our conclusion is that the danger inherent in subjecting the appellant's black containers *to the customary handling of drums of nitro-cellulose by lacquer manufacturers in the Louisville district* * * *."

In response to a petition for rehearing the court withdrew any statements, references or implications to the fact that any other person in the world except consignee, Jones-Dabney Company, had ever slid or skidded a drum of nitro-cellulose down a concrete ramp. Thus the court withdrew the facts on which it had based its first opinion but nevertheless let the decision stand, thereby imposing on petitioner the duty of foreseeing a misuse that no one else in the world ever practiced.

This decision of the Circuit Court of Appeals imposing on petitioner the legal duty of foreseeing a misuse of the container such as no one else in the world ever practiced, is in conflict with the decision of this Court in *Brady* v. *Southern Railway Company,* 320 U. S. 476, where this Court held that the cause of the particular accident "was so unusual, so contrary to the purpose of the derailer, that provision to guard against such a happening was beyond the requirement of due care. * * * Bare possibility is not sufficient. Evidence too remote to require reasonable provision need not be anticipated. * * * The carrier was not obliged to foresee and guard against the misuse of the derailer."

2. The decision of the Circuit Court of Appeals is in conflict with applicable decisions of the Court of Appeals of Kentucky that a party is only required to foresee that which is probable and not that which is possible.

3. In its first opinion the Circuit Court of Appeals stated that the use of the drum in question—I. C. C. 17-E, had been approved by the Bureau of Explosives of the Interstate Commerce Commission for use abroad *only*. The court held that it was not prejudicial for the District Court to have excluded the Rules and Regulations of the Bureau of Explosives. However in its second opinion the court admitted that the Bureau of Explosives had approved the use of the container in question for domestic as well as foreign use; nevertheless the court adhered to its original ruling as to the exclusion of this evidence.

4. The decision of the court below that the exclusion of the Rules and Regulations of the Bureau of Explosives was proper, is in conflict with decisions of the Second and Third Circuit Courts of Appeal.

5. The questions involved are important, not only to petitioner but to manufacturers generally, since the decision in this case imposes on manufacturers the duty of warning an experienced consignee not to do something that no one else ever did.

This is an important question of Federal law which has not been but should be settled by this Court.

CONCLUSION.

For the reasons herein set forth, it is respectfully submitted that the writ should be granted.

Respectfully submitted,

CHARLES W. MILNER,
ROBERT T. MCCRACKEN,
ABEL KLAW,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW.

Reference to the opinions of the Circuit Court of Appeals and of the District Court is made in the petition, page 2.

II.

JURISDICTION.

The statutory provisions under which the jurisdiction of this Court is invoked, is shown in the petition, page 2.

III.

STATEMENT OF THE CASE.

This appears in the petition, beginning at page 3.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

Errors to be urged are those specified in the petition, pages 15 and 16 under the heading "Questions Presented."

V.

ARGUMENT.

Point I.

The decision of the court below that petitioner was required to foresee a misuse which no other handler of nitro-celuose ever practiced, is in conflict with the latest decision from this Court and in conflict with the decisions of the Kentucky Court of Appeals on this subject.

The court below correctly held that the cause of the accident was sliding a drum of nitro-cellulose down a concrete chute with a drop of 3½ feet in a length of 14½ feet. The opinion states:

> "The drum which failed was then pushed across a concrete pavement and *skidded down a concrete chute with a drop of 3½ feet in a length of 14½ feet.*
>
> "There is no dispute as to the physical causes of the accident. The experts agreed that *the sliding of the steel drum upon the rough concrete surface of the ramp,*[5] caused a spark which ignited vapor released by a loosening of the head of the drum on the way down the ramp."

The court below, being then of the opinion that this treatment of sliding or skidding drums of nitro-cellulose down concrete ramps or chutes, was customary in the Louisville district, held that petitioner should have foreseen such handling of the drum in question and

[5]Italics ours throughout.

was negligent in not warning consignee against such handling. For ready reference the court below said in its first opinion:

> "The usual test for determining casual (causal)[6] relation between some failure of duty and an injurious result which follows, is the foreseeability of injury by the alleged negligent actor. * * * This test is satisfied, in the present case, by evidence of the customary handling of drums of nitrocellulose by the Jones-Dabney Company and other Louisville lacquer manufacturers, * * *"
>
> "Our conclusion is that the danger inherent in subjecting the appellant's black containers to the customary handling of drums of nitro-cellulose by lacquer manufacturers in the Louisville district, including their liability to spark when skidded, was foreseeable by the appellant (petitioner),[6] and so a direct casual (causal)[6] relation existed between the failure to warn the consignee of such danger and the injury which followed, unbroken by any fault of the consginee in the handling because that, too, was foreseeable in the light of attendant circumstances."

A petition for rehearing was filed (R. 205) which called the court's attention to the fact that the court had misunderstood the facts and that there was no evidence that any lacquer manufacturer or anyone else in the Louisville District or elsewhere, except the consignee, Jones-Dabney Company, ever skidded a nitrocellulose drum of any kind—either steel or galvanized iron—down a concrete chute or ramp. In response to this petition for rehearing the court filed a second

[6]Parenthesis supplied.

opinion and withdrew its statements or implications that there was a general practice among lacquer manufacturers in the Louisville district to skid drums of nitro-cellulose over rough concrete or down concrete ramps (R. 256). The court, however overruled the petition for rehearing.

We therefore have a case where an accident was caused by a misuse on the part of consignee, Jones-Dabney Company, such as no other handler of nitro-cellulose ever practiced, coupled with the fact that such misuse was correctly held by the court below to be the cause of the accident.

The holding by the court below that petitioner should have foreseen that consignee, Jones-Dabney Company, would skid a drum of nitro-cellulose down a concrete ramp is in conflict with the latest decisions from this Court on the subject of proximate causes and foreseeability.

In *Brady, Admrx.*, v. *Southern Railway Company*, 320 U. S. 472, where a derailer was hit from the wrong direction and where it appears that this had frequently happened before, this Court held that the railroad company was not required to foresee such a misuse of the derailer. The Court said:

> (p. 483) "* * * There is no evidence of unsuitability of the rail for ordinary use."[7]
>
> (p. 483) "The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction 'was so unusual, so con-

[7]There is no evidence in the instant case of the unsuitability of the container in question for the ordinary handling of such containers by everyone except consignee, Jones-Dabney Company.

trary to the purpose' of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. Milwaukee & St. Paul Ry. Co. v. Kellog, 94 U. S. 469, at 475:

" 'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'

"Events too remote to require reasonable provision need not be anticipated."

(p. 484) "* * * Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm. * * *"

The decision of the court below is also in conflict with the decisions of the Court of Appeals of Kentucky—the highest state court—on the subject of foreseeability.

Watrals, Admr., v. *Appalachian Power Company*, 273 Ky. 25, 115 S. W. (2d) 372. In this case a child was killed while flying a kite, to which was attached a small copper wire, when the copper wire came in contact with the power line of the power company. The Kentucky Court of Appeals held that the company was not re-

quired to foresee such an unusual thing as a child flying a kite with a copper wire.

> (p. 30) "In the instant case, the wire, though only 13 feet above the ground, was beyond the reach of children playing in the road or on the ground beneath the wire. The distance of the wire above the ground bore no relation to the accident. The result, no doubt, would have been the same had the wire been 30, 50, or more feet above the ground. It was alleged in the petition that the appellees knew children played in the road and flew kites in the vicinity of the wire, but it was not alleged that these children flew kites with copper wires attached thereto. It is a matter of common knowledge that children ordinarily use strings, which are nonconductors or electricity, in flying kites, and no facts are alleged which would charge appellees with knowledge that a copper wire might be used. The act that caused the accident was an independent one of the Robinette boy, which *could not reasonably have been anticipated* by the appellants."

Merchants Ice & Cold Storage Company v. *United Produce Company,* 279 Ky. 519, 131 S. W. (2d) 469.

> (p. 525) "Men are not called upon to guard against every risk that they may conceive as possible, but only against what they can forecast as probable."

Since no one except consignee, Jones-Dabney Company, ever slid or skidded a drum—either heavy or light—of nitro-cellulose down the rough surface of a concrete ramp, petitioner could not possibly have an-

ticipated, and should not in law be required to foresee and warn against, such a happening.

Since the skidding or sliding of the drum down the concrete ramp was the cause of the accident, it was bound to be proximate cause of the accident and the court below erred in not directing a verdict for petitioner.

Point II.

A party is not required to give a consignee notice of facts which the consignee admits it knew without such notice.

This point is stated at pages 11, 12, 13 of the petition.

Point III.

In its first opinion the court below erroneously stated that the container in question had been approved by the Bureau of Explosives of the Interstate Commerce Commission *only* for foreign use and that it was not prejudicial error to exclude the Rules and Regulations of the Bureau of Explosives from the jury.

In response to a petition for rehearing the court below enlarged its original opinion so as to show that the Bureau of Explosives had approved the container in question for domestic as well as foreign use. However, the court still continued to hold that petitioner was not entitled to put the Rules and Regulations of the Bureau of Explosives before the jury.

Such a decision is in conflict with decisions of both the Second and Third Circuit Courts of Appeal.

In *Westchester Fire Insurance Company* v. *Buffalo Housewrecking and Salvage Co.,* 129 Fed. (2d) 319, the Second Circuit Court of Appeals made reference to Pamphlet No. 7 of the Bureau of Explosives and affirmed the same case reported in *40 Fed. Sup. 378* in which the District Court held:

> "* * * Upon the trial the libellant offered in evidence Pamphlet No. 7 issued by the Bureau of Explosives of the United States Government. Objection to its reception in evidence was made. Decision on the motion was then withheld. In my opinion, it was competent to be received, and the objection is overruled. 18 U. S. C. A., §383, Crim. Code, §233; Wigmore on Evidence, Third Edition, Vol. 6, p. 21; G. & C. Merriam Co. v. Syndicate Pub. Co., 2 Cir., 207 F. 515; Lehigh Valley R. Co. v. State of Russia, 2 Cir., 21 F. 2d 406; The Vestris, D. C., 60 F. 2d 273. * * *"

See also *Lehigh Valley R. Co.* v. *State of Russia,* 21 Fed. 2d 406, 2 C. C. A.

Fidelity & Deposit Co. of Maryland, et al., v. *Lehigh Valley R. Co.,* 275 Fed. 922, 3 C. C. A. In this case the Third Circuit Court of Appeals authorized the introduction of Rules and Regulations of the Interstate Commerce Commission.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES W. MILNER,
ROBERT T. MCCRACKEN,
ABEL KLAW,
Attorneys for Petitioner.

APPENDIX.

ORIGINAL AND PER CURIAM OPINIONS.

No. 9818.

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT.

E. I. DuPont De Nemours & Company, *Appellant*,
v.
Minnie L. Wright, Administratrix of the Estate of William T. Wright, Deceased, *Appellee*.

Appeal from the District Court of the United States for the Western District of Kentucky.

Decided December 7, 1944.

Before Simons, Allen, and McAllister, Circuit Judges.

Simons, Circuit Judge. The accident which caused the death of the appellee's decedent was the result of the rupture and subsequent ignition of a drum of nitro-cellulose manufactured by the appellant and shipped by it to the Jones-Dabney Company, a lacquer manufacturer, in Louisville, Kentucky. The decedent was an employee of the consignee, and the consignor appeals from a judgment for the decedent's administratrix on ground that it was not negligent and, in the alternative, if negligence was proved it was not the proximate cause of the death, the